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No. 93-644

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD. AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners

v.

KARL L. OBERG,

Respondent

On Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Oberg has written at great length but has almost entirely failed to come to grips with Honda's arguments.[1] Instead, he engages in two diversionary tactics. The first concerns the nature of the excessiveness review provided by Oregon. This Court granted review, and Honda has briefed the case, on the understanding that no such review was available below. But with the filing of his brief on the merits, Oberg claims for the first time that Honda actually *did* get excessiveness review in the Oregon courts. As we show below, this contention is preposterous.

Oberg's second exercise in misdirection concerns the nature of Honda's argument. Throughout his brief, Oberg maintains that Honda has asserted a constitutional right to something he calls "weight-of-the-evidence" review, by which he evidently means a standard that would allow the judge to sit as a sort of "13th juror," setting aside verdicts whenever the judge would have come to a different conclusion had the case been tried without a jury. But that manifestly is *not* the nature of the review requested by Honda as a matter of constitutional right, and *nothing* in Honda's opening brief even remotely supports Oberg's mischaracterization. Instead, the "excessiveness review" that Honda believes is required by the Due Process Clause would "ascertain[] whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support" the jury's verdict as a matter of law. *Santosky* v. *Kramer*, 455 U.S. 745, 757 (1982). Under such a standard, a court would remit or set aside an award that no reasonable jury could have found to be proper compensation or appropriate

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[1] Oberg's brief contains a lengthy factual statement that makes various assertions regarding the conduct that gave rise to liability and various claims of waiver with regard to the substantive merits of Honda's excessiveness challenge. These assertions are inaccurate in many important particulars, but because they are irrelevant to the legal issues before this Court we do not offer a detailed rebuttal.

punishment under the criteria established by state law. With this standard in mind, we proceed to address Oberg's contentions.[2]

A. Oregon Law Provides No Excessiveness Review

Our basic submission in this case is that Oregon's failure to provide judicial excessiveness review is unconstitutional. In response, Oberg argues at great length (Br. 24-38) that the Oregon courts *do* provide (and that Honda did in fact receive) just such review. This contention — which would doubtless astonish the many Oregon judges who have declared themselves powerless to correct excessive judgments — is plainly wrong.

1. As an initial matter, it should be noted that Oberg's current reading of Oregon law represents a complete about-face in his position. Until now, Oberg was of the view, as he put it to the Oregon Court of Appeals, that "neither the circuit court nor the appellate courts possess the power, after the constitutional amendment of 1910, to set aside or reexamine a jury verdict merely for excessiveness." CA Br. 37. Oberg specifically added that, while *Van Lom* left open the question whether an Oregon court may "review and set aside a verdict given under the influence of 'passion and prejudice,'" "the statutory basis for relief from a verdict for 'passion or prejudice' no longer exists." *Id.* at 38. Oberg took the same position in the state trial court and in the Oregon Supreme Court.[3]

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[2] Oberg asserts in a footnote to his summary of argument (Br. 12 n.13) that Honda has waived its challenge to the failure to review the size of the compensatory award. He also made this argument in opposing the petition; Honda explained in its reply (at 7-8) why the waiver argument is insubstantial, and this Court did not limit its grant of review. Accordingly, further discussion of the issue is unnecessary.

[3] See Plaintiff's Response to Defendants' Motions for New Trial and JNOV 43 (*Van Lom* "prevents the court from correcting an allegedly excessive verdict, unless the court can affirmatively say the verdict is supported by no evidence. Oregon Constitutional law on this point is well established and binding on this court."); Brief of Plaintiff-Respondent in Opposition to Petition for Review 11-14 (arguing that excessiveness review is not a requirement of due process). For its part, Honda expressly *acknowledged* before all three courts below that Oregon stands "in 'lonely eminence' among all jurisdictions as a result of [the Oregon Supreme Court's] holding that Article VII (amended), section 3, of the Oregon Constitution restricted the power of Oregon's trial and appellate courts to review and correct excessive verdicts" (Or. Sup. Ct. Pet. Rev. 11), and that the constitutional amendment "has rendered Oregon the only state where trial and appellate judges cannot correct runaway verdicts." *Id.* at 22-23. See Ct. App. Br. 40; Motion for New Trial 47-50. While Honda argued that the Oregon courts should abandon *Van Lom*, they obviously did not do so.

Oberg's brief opposing certiorari reiterated his position that excessiveness review is unavailable in Oregon. Thus, he explained that the Oregon Supreme Court "concluded that in light of the elaborate safeguards utilized to circumscribe and guide the jury's exercise of discretion in this case, *the constitutionally prescribed measure of judicial review in Oregon (ensuring that the jury was properly instructed and that there was evidence to support an award of punitive damages)* was adequate under the Due Process Clause." Br. in Opp. 9 (emphasis added). Oberg defended that decision on the ground that due process does not "require[] that State trial judges have the power to set aside jury verdicts arrived at after a fair trial" (*id.* at 16); he nowhere suggested that Oregon provides, or that Honda received, post-verdict excessiveness review.[4]

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[4] The only arguable ambiguity on this point concerns the question whether the court below reviewed the punitive award for federal constitutional excessiveness. Oberg did refer to the Oregon court's comparison of the punishment here with that in *Haslip* as an "implicit conclusion that the award here, like the *Haslip* award, is not constitutionally excessive." Br. in Opp. 12. At the same time, he correctly recognized that the court's holding rested on the view that in Oregon it is *procedural safeguards at trial* that "ensure that sufficiently definite and meaningful constraints are imposed on the jury which, in turn, ensures that an award of punitive damages bears a rational relationship to a defendant's conduct and the need for punishment and deterrence." *Id.* at 8. In the end, Oberg was unclear on whether he believed that the

It may be added that Oberg's *amici* the Oregon Trial Lawyers Association (OTLA) and the State of Oregon — both of which presumably have familiarity with Oregon law — continue to believe, as the State puts it, that "[a]n Oregon court * * * may not re-examine the damages the jury awarded to determine if, in the court's view, the award is excessive. The Oregon Constitution prohibits state courts from engaging in this form of judicial review * * * ." Oregon Am. Br. 2. See also *id.* at 4; OTLA Am. Br. 7.

2. In his brief on the merits in this Court, however, Oberg (now represented by new, non-Oregon counsel) has made the belated (but remarkably opportune) discovery that Oregon does provide excessiveness review after all. Indeed, Oberg now reports that Honda received *three* separate types of excessiveness review in the courts below: review to determine whether the evidence supported "the jury's measure of damages" (Br. 31-38); review to determine whether the size of the verdict reflected jury passion or prejudice (*id.* at 29-31); and review to determine whether the award comported with federal substantive due process standards. *Id.* at 25-27.[5] Oberg's failure to raise at least the first two of these points in his brief in opposition to the petition for certiorari makes it inappropriate for him to advance them now. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 788-789

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court below had the power to review an award for conformity with federal substantive due process guarantees.

[5] Oberg is correct in one respect: Oregon appellate courts may adjust damages in cases of trial error. Br. 28. As we already have explained, however (see Honda Br. 30-31 n.23), this fact is entirely irrelevant here because no relief is available where the only legal error relates to the excessiveness of the amount awarded. See, *e.g.*, *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954) ("we are without power to consider whether or not the punitive damages were excessive, and we must uphold the verdict whether deemed excessive or not, *unless we find other error authorizing the granting of a new trial*") (emphasis added).

(1994). But more fundamentally, his argument cannot be squared with even the most cursory reading of Oregon law.

a. Oberg contends that Oregon courts "have the power to review damages awards to determine whether there is substantial evidence to support the jury's *measure of damages*." Br. 31 (emphasis added). By this he evidently means that an Oregon court in a case such as this one may review the evidence and determine whether it supports a $5 million punitive award; if the court finds that no reasonable jury could return such an award, it will reduce the verdict to the amount that a jury reasonably could return. See *id.* at 32-33. Were Oberg correct in this assertion, Oregon's system would not differ significantly from that used by the other 49 states. And that is indeed Oberg's avowed position: he declares that Oregon does *not* "stand[] alone among the States." Br. 17 n.17.

Oberg's account of the Oregon system, however, is the purest fiction. As we have explained (see Honda Br. 17), the Oregon Supreme Court itself has acknowledged the State's "lonely eminence" in denying excessiveness review. Indeed, *Van Lom* expressly rejected the proposition that review of the sort now suggested by Oberg is available in Oregon:

> The argument is made that the circuit courts "have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict". This may be done, it is said, where "the verdict is in excess of an amount that would be regarded by all reasonable men as the maximum recovery justified by the evidence." When the conclusion is reached that the verdict is to that extent excessive, the argument proceeds, the court "can affirmatively say there is no evidence to support the verdict" and no violence is done to the Constitution. * * *
>
> We think the argument is unsound. It is in reality only a formula under which the courts would in prac-

> tice do the very thing which they were accustomed to do before Art. VII, § 3, was adopted.

Van Lom, 210 P.2d at 463-464 (footnote omitted). Accord, *e.g.*, *Foley* v. *Pittenger*, 503 P.2d 476, 477 (Or. 1972).[6]

Oberg contends that these statements in *Van Lom* were intended simply to reject what he labels "weight-of-the-evidence" excessiveness review. See Br. 35 & n.41. As explained in our opening brief (at 3), however, *Van Lom* read the amendment of Article VII, § 3, to take from courts their pre-existing authority to set aside verdicts that were "'palpably or outrageously excessive,'" "'unreasonable or outrageous,'" so large "'as to strike every one with [their] enormity and injustice,'" or that "'no twelve men could reasonably have given.'" *Van Lom*, 210 P.2d at 464 (citations omitted). The constitutional amendment thus goes well beyond preventing the Oregon courts from, as Oberg derisively puts it, "vacat[ing] awards based on their subjective views about 'excessiveness.'" Br. 35 n.41. The Court need only read *Van Lom* to see how far Oberg's recitation of Oregon law departs from reality.[7]

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[6] Oberg asserts (Br. 35) that *Van Lom*'s discussion of the power of Oregon trial courts was dictum that should be disregarded by this Court. In fact, however, the Oregon Supreme Court had specifically requested briefing on the question whether Article VII, § 3 stripped state trial courts of their power to engage in excessiveness review (see *Van Lom*, 210 P.2d at 463); the court addressed the issue at great length (see *id.* at 463-465) because, as it explained, "the first sentence of Art. VII, § 3, applies both to the Circuit Court and to this court" (*id.* at 463); and its conclusion that all courts in Oregon had been denied powers of review plainly was the holding of the case. Oberg also makes the related contention (at Br. 36) that the *Van Lom* court, in declaring itself powerless to set aside an excessive verdict, was referring only to the traditional limits on powers of appellate review. That contention is so blatantly inconsistent with *Van Lom*'s reasoning (see 210 P.2d at 462) that specific refutation is unnecessary.

[7] In arguing that review of the size of a verdict is available, Oberg cites the Oregon Court of Appeals' opinion in *Roberti's House of*

Oberg makes a related claim (Br. 36-38) that Honda could have received the same kind of protection it seeks here *before* the case was sent to the jury. According to Oberg, Honda could simply have asked the trial judge to determine, as a matter of law, the maximum amounts of economic, non-economic, and punitive damages that the evidence would justify. Under this hypothetical procedure, litigants would be required to make, and judges to rule upon, protective motions in *every* case (without knowing whether a large award ultimately would be returned or even whether a finding of liability will be made). Moreover, in the many cases involving multiple causes of action, such an inquiry would be a practical impossibility because the trial judge would not yet know the causes of action upon which the defendant will be found liable (if any). Not surprisingly, Oberg fails to cite a single case in which a court has utilized such a procedure when punitive or non-economic damages were at issue. The fact that no court or commentator ever has suggested this cumbersome, inefficient, and, in many instances, unworkable procedure as a substitute for the deeply entrenched, universal safeguard of post-verdict review is strong evidence that it does not in fact exist and is merely one more post hoc argument concocted by Oberg's Supreme Court counsel in an effort to avoid the merits of Honda's claim.

b. Oberg also argues that Honda received "passion-or-prejudice" review (Br. 29-31), by which he evidently means that the courts below were free to set aside the verdicts had they

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Wines, Inc. v. *Somerset Wine Co.*, 703 P.2d 976, 979 (Or. Ct. App. 1985). (The opinion is miscited by Oberg as a decision of the Oregon Supreme Court.) The court acknowledged, however, that "[w]e may affirm the grant of a new trial only if we 'can affirmatively say that there was no evidence to support the verdict.'" *Id.* at 978 (citation omitted). Applying this principle, the court granted a new trial because the jury's award was premised on a mathematical miscalculation, so that there effectively was no evidence to support particular elements of the judgment. See *id.* at 979-980. That holding has no application in cases such as this one. The other decisions cited by Oberg on this point (at Br. 32-33 n.37) all *affirmed* damages awards.

believed their size to evidence passion or prejudice. See *id.* at 29. In fact, it is not likely that passion-or-prejudice review of any sort is permitted in Oregon. *Van Lom* noted "previous decisions" that the Oregon courts' power to engage in such review had been removed by Article VII, § 3, although it expressed no opinion on whether it would "adhere" to those decisions in the future. 210 P.2d at 468. Subsequent cases have expressed doubt that such review is available. *E.g.*, *Trenery* v. *Score*, 609 P.2d 388, 389-390 (Or. Ct. App. 1980). Oberg has cited no post-*Van Lom* case, and we are aware of none, in which an Oregon verdict has been set aside on passion-or-prejudice grounds.[8]

Even if passion-or-prejudice review were available, the scope of that review would be far narrower than Oberg suggests. Oberg asserts (Br. 30 n.33) that passion-or-prejudice review in Oregon is identical to "the very common-law test that Honda claims to advocate." That is true in other states, where "passion-or-prejudice" is a verbal fiction that has long been used to justify setting aside an excessive jury award: when the verdict is too large to be rationally explained, courts have presumed it to be the product of passion or prejudice. See, *e.g.*, *Wells Fargo Armored Serv. Corp.* v. *Turner*, 543 So. 2d 154, 158-159 (Miss. 1989); *Sizemore* v. *Hoskins*, 235 S.W.2d 1011, 1014 (Ky. Ct. App. 1951). But that is manifestly *not* the post-amendment test in Oregon, where it is quite clear that "a trial court is precluded from awarding a new trial on the ground that the mere size of a verdict is sufficient to establish that it was given under passion and prejudice." *Lane* v. *Stewart*, 351 P.2d 73, 80 (Or. 1960). Instead, passion or prejudice may be found in Oregon (if at all) only if some irregularity in the proceedings

[8] For the proposition that such review is available, Oberg relies (Br. 29 n.32) on the opinion of Justice McBride in *Donaghy* v. *Oregon-Washington R. & Nav. Co.*, 288 P. 1003, 1014 (Or. 1930). Oberg fails to note that Justice McBride was "speaking for himself and not for the court." *Ibid.*

tainted the jury's decision.[9] Were it otherwise, Oregon would not occupy what its Supreme Court has described as a "lonely eminence" in the restrictiveness of its review.

This proposition is settled by an Oregon statutory amendment that is noted by Oberg himself (at Br. 29-30 n.32). Prior to 1979, passion-or-prejudice review was available in Oregon (if at all) pursuant to ORS 17.610(5). In 1979, that provision (along with other statutes governing trial procedure) was replaced by the Oregon Rules of Civil Procedure, which in relevant part permit a new trial only in cases of jury "[m]isconduct" or any "[i]rregularity in the proceedings of the court, jury or adverse party." ORCP 64B(1), (2). A leading treatise on Oregon procedure explains that the provision permitting a new trial if damages were so high as to evidence passion or prejudice "was eliminated by the 1979 Legislature because it probably conflicted with the right to trial by jury in the Oregon Constitution." L. Kloppenberg, OREGON RULES OF CIVIL PROCEDURE: 1994 HANDBOOK 182 (1994). The Legislature's focus on juror misconduct and its elimination of any reference to passion-or-prejudice review confirms that excessiveness of the verdict (no matter how denominated) is *not* a ground for a new trial in Oregon.

Oberg nevertheless contends (Br. 30) that Honda *did* receive passion-or-prejudice review in the trial court. He supports this

[9] See *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954) ("we are without power to consider whether or not the punitive damages were excessive, and we must uphold the verdict whether deemed excessive or not, *unless we find other error authorizing the granting of a new trial*") (emphasis added); *Timmins* v. *Hale*, 256 P. 770, 776 (Or. 1927) ("since there is nothing in the record showing any misconduct on the part of the jury, it was not proper for the court to set aside the judgment on the ground that the damages were excessive"); *Trenery*, 609 P.2d at 390 ("[W]e conclude that defendant has not established that the verdict was influenced by passion or prejudice. The only basis offered by defendant for a new trial is that the verdict was excessive in relation to plaintiff's injuries. *This is not sufficient.*") (emphasis added).

argument by asserting that Honda asked the court to provide such review, that Oberg answered Honda's claim on the merits, and that the court proceeded to deny Honda's request without opinion. But Oberg expressly did *not* concede that passion-or-prejudice review was available in the trial court. See Plaintiff's Response to Defendant's Motions for New Trial and JNOV 45. And the only logical assumption about the trial court's unexplicated decision is that the court followed controlling Oregon law by declining to review the size of the judgment.

c. Finally, Oberg contends (Br. 25-27) that the court below reviewed the judgment to determine whether it was excessive under federal substantive due process standards. He asserts that the court "recognized its duty to 'ensure that an award of punitive damages ... bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence.'" *Id.* at 25-26, quoting Pet. App. 28a. But this quotation is misleadingly pulled out of context. The opinion below addressed the procedural safeguards available in Oregon. The court outlined those safeguards (which do not include excessiveness review) and opined that "*[t]hose procedural protections*, in turn, ensure that an award of punitive damages" is adequately related to the policies of punishment and deterrence. *Id.* at 28a (emphasis added). While it observed in a footnote that the ratio of punitive to compensatory damages in this case was similar to that in *Haslip* (see *id.* at 29a n.14), the court nowhere indicated that it had engaged in any independent excessiveness review. To the contrary, had it thought itself to be providing substantive excessiveness review, it would have had no cause to state that it did "*not* interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." *Id.* at 25a (emphasis added).[10]

[10] This understanding is confirmed by the decision in *Eulrich* v. *Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App.), rev. denied, 859 P.2d 540 (Or. 1993), cert. pending, No. 93-697. There, the Oregon Court of Appeals relied on the holding below without considering the defendants' assertion (see No. 93-697, Pet. App. A-53) that the $9 million punitive award violated substantive due process. See 853 P.2d at 1362.

In any event, Oberg is incorrect in contending (Br. 27) that *substantive* due process review would satisfy Honda's *procedural* due process rights. As we explained in our opening brief (at 27 n.18), the Due Process Clause requires that the states make use of procedures that minimize departures from the *state-law* standards that authorize deprivations of liberty or property. Excessiveness review under the federal constitutional standard does not serve that purpose. Oberg offers no response to this point.

d. In sum, it is plain that Oregon law does not provide, and Honda did not receive, any form of excessiveness review. But if Oberg has been able to generate doubts on that score, he should not be allowed to benefit from his shell game. Given Oberg's failure at the certiorari stage to make the arguments he now advances, the Court should presume that Honda did not receive excessiveness review and should answer the question presented in the petition. See *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983). If Oberg is correct and excessiveness review already has been provided, the point will quickly be settled on remand from this Court's decision. But if Honda has not received any such review (as we think plainly is the case), it should not be deprived of an answer to the question upon which certiorari was granted — and of the excessiveness review to which it is entitled by the Due Process Clause — because of Oberg's calculated and cynical efforts to obscure Oregon law.

B. Judicial Excessiveness Review Is Required By The Due Process Clause

Oberg's visibly strained effort to find some basis for avoiding the merits stands as a tacit admission that he has little persuasive to say about the constitutional question on which the Court granted review. His argument on the merits — parts of

which we frankly find obscure — appears to consist of three contentions: that states may vest unreviewable decisionmaking authority in pretty much anyone (Br. 20-24); that judicial review of jury verdicts historically was not provided anywhere (*id.* at 38-39); and that the Oregon system is constitutional under the test of *Mathews* v. *Eldridge* (*id.* at 39-50).[11] We imagine that this argument will come as something of a revelation to the five Justices who *expressly* concluded last Term in *TXO* that "'procedural due process' requires judicial review of punitive damages awards for reasonableness." 113 S. Ct. at 2727 (Scalia, J., joined by Thomas, J.) (also observing that same is true with respect to compensatory damages). See *id.* at 2742 (O'Connor, J., joined by White and Souter, JJ.). See also Honda Br. 37-38 (explaining that same conclusion is implicit in plurality opinion). Not surprisingly, Oberg's submissions are insupportable.

1. Oberg contends (Br. 20) that "due process has never been thought to preclude Congress and the States from vesting final decisionmaking authority over particular issues (especially factual ones) in juries and other non-judicial decisionmakers." He advances four points in support of this assertion: that at one time juries "had the power to decide questions of both law and fact" (*id.* at 21); that "[t]his Court has upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty" (*id.* at 22); that administrative agencies may be given unreviewable discretion to decide certain issues (*id.* at 23-24); and that there really is no such thing as a

[11] Oberg also contends (Br. 18-20) that the Oregon system is rendered fundamentally fair by what he describes as "extensive pre-verdict protections for defendants." Only two of these protections, however, relate to the size of a punitive judgment. The first is that the award is limited by the amount that *the plaintiff himself requests* in his complaint (*id.* at 18), which is hardly the sort of limitation that will help defendants sleep soundly. The second involves what Oberg calls "detailed" jury instructions. *Id.* at 19. In fact, as we explained in our opening brief (at 32-33), the instructions in this case did *not* serve as a meaningful check on the jury's discretion. Oberg offers *no* response to that argument.

state judge for constitutional purposes anyway, because "a State could have a neutral layperson * * * perform the function of reviewing punitive damage awards for excessiveness" (*id.* at 20-21).

For the most part, these points are clearly wrong even on their own terms.[12] More fundamentally, however, taken to its

[12] This Court has not, for example, "upheld capital punishment schemes vesting final authority in the jury to decide whether to impose the death penalty" (Oberg Br. 22); the various schemes cited by Oberg all provided for extensive appellate review. See *Gregg* v. *Georgia*, 428 U.S. 153, 161 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek* v. *Texas*, 428 U.S. 262, 268 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Boyde* v. *California*, 494 U.S. 370, 375 (1990); *Commonwealth* v. *Blystone*, 549 A.2d 81, 93 (Pa. 1988). And Oberg's assertion that "[t]his Court has already declined to review a judgment affirming the application of Art. VII, § 3 to death penalty cases" (Br. 22 n.23) is a grotesque distortion. It is true that the Oregon Supreme Court upheld such an application of the provision in *State* v. *Wagner*, 752 P.2d 1136 (Or. 1988). But this Court vacated the decision for reconsideration in light of an intervening case. 492 U.S. 302 (1989). On remand, the death penalty was *vacated*. 786 P.2d 93 (Or. 1990). The Court subsequently denied *Oregon's* petition for certiorari from the vacatur of the death sentence. 498 U.S. 879 (1990). This history hardly can be read as "declin[ing] to review a judgment affirming application of Art. VII, § 3."

The hoary decisions permitting juries to be told that they were judges of law as well as fact (cited at Oberg Br. 21-22 & n.21) authorized a form of jury nullification that acted as a safeguard in cases involving unjust criminal prosecution or other forms of official oppression. They cannot be read to validate the power of a jury *itself* to act as an oppressor by taking property arbitrarily.

The hodgepodge of other decisions cited by Oberg at Br. 20-24 are simply off the point. Thus, *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), had nothing to do with the denial of judicial review. In *Stein* v. *New York*, 346 U.S. 156 (1943), which involved the question whether the jury could be permitted to judge the voluntariness of a confession, appellate review was permitted — and even so, *Jackson* v. *Denno*, 378 U.S. 368 (1964), held that the coercion question could not

logical conclusion, Oberg's submission means that a state could select a single lay decisionmaker for the purpose of resolving an individual case, tell her that she is the sole judge of the law and the facts, and allow her — applying whatever she deems the law to be — to sentence a defendant to death, all without any possibility of judicial review at any point. This line of argument departs so radically from basic concepts of fairness that we cannot believe that Oberg's eminent counsel advance it seriously.

In fact, the question in a case such as this one is whether the decisionmaking process used by the state to deprive the defendant of property is fundamentally fair. Historical practice bears on this; so do the considerations articulated in *Mathews* v. *Eldridge*. All of these factors establish the unconstitutionality of the Oregon system, as we explain below.

2. Oberg (Br. 38-39) and his *amici* of self-styled "Legal Historians" maintain that excessiveness review was not available at common law. They fail to note that this Court already has concluded to the contrary, recognizing that "[u]nder the traditional common-law approach" the "jury's determination [of

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be presented to the jury unless there was a prior judicial determination of voluntariness. In *Chicago, R. I. & P. Ry.* v. *Cole*, 251 U.S. 54 (1919), the Court held that because the state did not have to permit a defense of contributory negligence at all, it was free to make the jury's factual determinations regarding that defense unreviewable — an observation that has no application to a situation, like the one here, where the state, far from creating a defense, has made available a potentially boundless area of *liability*. In any event, the decision in *Cole* (which has not been cited by this Court for any proposition since 1932) was premised on the view that the defendant "cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed" (*id.* at 56), a form of "bitter with the sweet" due process analysis that has since been soundly rejected by this Court. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Space unfortunately does not permit us to offer a detailed distinction of the other decisions cited by Oberg, none of which even remotely supports his argument.

damages] is * * * reviewed by trial and appellate courts to ensure that it is reasonable." *Haslip*, 499 U.S. at 15. See *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring in the judgment); *id.* at 2729-2730 (O'Connor, J., concurring in the judgment). The Court was correct; Oberg and his *amici* are not.

In arguing that excessiveness review was unavailable in 18th century England, Oberg and his *amici* rely almost entirely on *Beardmore* v. *Carrington*, 95 Eng. Rep. 790 (C.P. 1764).[13] Oberg Br. 38-39. *Beardmore* does contain the statement that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts." 95 Eng. Rep. at 793. Curiously, however, the *Beardmore* court had just identified *Chambers* v. *Robinson*, 93 Eng. Rep. 787 (K.B. 1726), as precisely such a case; in addition, the *Beardmore* court observed that "it is said in an hundred cases in the books that an attaint does lie" "for excessive damages" in tort cases. 95 Eng. Rep. at 792-793. And most important for present purposes, the court expressly recognized that manifestly excessive damages could be set aside. *Id.* at 793. As we have explained (Honda Br. 14 & n.9), that principle was recognized repeatedly in England prior to American independence. See, *e.g.*, *Gilbert* v. *Burtenshaw*, 98 Eng. Rep. 1059, 1060 (K.B. 1774) (Mansfield, J.); *Fabrigas* v. *Mostyn*, 96 Eng. Rep. 549 (K.B. 1774).

As for 19th century American practice, Oberg (Br. 39) and his "Legal Historians" (Br. 15-17) *acknowledge* that passion or prejudice review was generally available — which meant then, as it still does in many states, that an award would be set aside if larger than rationally justified by the evidence in the case.

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[13] Oberg and his *amici* entirely fail to respond to our demonstration (Honda Br. 12-13 & nn. 7, 8) that early English courts exercised a variety of informal controls over juries and that the courts' power to grant new trials when verdicts were returned against the weight of the evidence had been established dispositively by the mid-18th century. As we noted, those propositions have been endorsed by Holdsworth, Plucknett, and other leading historians of the period.

See, *e.g.*, D. Graham, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 452 (1st ed. 1834) (new trials granted when "*the result* of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion") (emphasis added); T. Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 533 (1868) (new trial where "verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption"); 3 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 469 (1883) (new trial when damages "so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment"). True, courts early on in both England and this country were reluctant to interfere with jury verdicts, and would do so only when damages awards were demonstrably excessive. But courts plainly *would* provide a remedy in such cases. Against this background, Oregon's conceded failure to do so — even when the judgment is one that "'no twelve men could reasonably have given'" (*Van Lom*, 210 P.2d at 464 (citation omitted)) — is unconstitutional. See Honda Br. 17.

3. Oberg's application of the *Mathews* test is tainted by the same error that infects the rest of his brief: the patently false premise that Honda seeks "weight-of-the-evidence" review. In any event, Oberg's analysis of the particular elements of the *Mathews* standard is unsound.[14]

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[14] Oberg suggests (Br. 40-42) that *Mathews* does not apply in this case because the jury's role as "an instrument of self-government" is more important than the "humdrum bureaucracy involved in *Mathews*." Here again, Oberg mischaracterizes our arguments. We do not attack the jury system as a whole; we contend only that a particular safeguard is necessary to correct errors that otherwise would be caused by a particular defect in the jury process. There is nothing novel in that. This Court has held on a number of occasions that due process requires the imposition of particular constraints on the operation of juries. See, *e.g.*, *Jackson* v. *Denno*, supra.

a. So far as the private interest here is concerned, Oberg does not deny either that the amounts at stake in a case such as this one may be enormous or that the award of a large punitive verdict may impose a significant stigma on the defendant. See Oberg Br. 42. His argument that this stigma is irrelevant because punitive damages are "quasi-criminal" and *Mathews* is not used to assess procedures that are part of the state criminal process (Br. 42 n.51) is so manifestly untenable as to require no discussion beyond noting that this is not a criminal case.

b. Oberg's argument on the question whether Oregon's system is likely to lead to erroneous deprivations of property is directed at a caricature of Honda's position. We obviously do not assert that the jury system is bankrupt and that most jurors are credulous simpletons.[15] But however manifest the jury's value as a finder of facts and a bulwark against tyranny, the jury does have notable limitations that are of particular significance when it comes to the award of punitive and other unliquidated damages. As we explained in our opening brief (at 22-26, 31-32), individual jurors have no experience in setting judicial punishments and therefore operate entirely without a frame of reference in awarding punitive damages; because they deliberate in secrecy and render a verdict without explanation, juries operate without either accountability or external constraints; and juries plainly may be influenced by improper criteria, such as the defendant's nationality or wealth. Oberg makes *no* response to any of these points.

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[15] Although Oberg (Br. 40-41) omits internal quotation marks and attributes the sentiments to Honda, it was Judge Jerome Frank who believed that "the jury applies law it doesn't understand to facts it can't get straight" and Mark Twain who observed that the jury system is "worthless" and places a premium on "ignorance." See Honda Br. 22 n.16. Oberg also labels "remarkable" Honda's supposed statement that jurors are "untrained" (the observation actually was made by Michael Saks), but it is hard to see why he believes that comment to be controversial.

Instead, Oberg largely confines his argument to the assertion that "the social science evidence does not bear out Honda's claim." Br. 43 (footnote omitted). But we hardly need social science to establish our point: this Court itself has recognized the risk of jury bias against out-of-state corporate defendants (see Honda Br. 25-26), and most of our other observations are grounded in common sense. It may be added, however, that Oberg's discussion of the social science literature is yet another exercise in misdirection. While Oberg asserts that the "materials cited by Honda do not support its argument" (Br. 44 n.52), he fails to discuss many of the sources cited in Honda's opening brief. In particular, Oberg does not, and plainly could not, refute the nearly unanimous view of researchers that juries often do not understand their instructions. See Honda Br. 31-32 & n.24. As for the sources he does address, Oberg limits himself to proffering brief snippets from each in praise of various aspects of the jury system. See Oberg Br. 43-45 n.52. That is simply not responsive to the specific criticisms leveled by these authorities.

Finally, Oberg asserts that "Honda's definition of [jury] 'error' is fatally flawed" because "[t]here simply is no basis for Honda's claim that 'error' occurs any time a judge would find that an award was contrary to the weight of the evidence." Br. 42. Once again, we are constrained to note that this is *not* Honda's contention. Instead, as we explained in our opening brief (at 26-27), a verdict would work an unlawful deprivation of property if it exceeds any amount that could reasonably be thought to serve the purposes authorized by state law. Procedural due process entitles a defendant to a judicial determination whether such an error has occurred.

Moreover, although they quibble with some of the specifics of Honda's empirical data (see Oberg Br. 42-43), neither Oberg nor his *amici* deny that such reversals occur with substantial frequency. They plainly could not; as we noted in our opening brief (at 29 n.21), the "peer-review[ed]" study hailed by Oberg's *amicus* Trial Lawyers for Public Justice (TLPJ) (see Br. 9, citing Rustad, *In Defense of Punitive Damages in Products*

Liability: Testing Tort Anecdotes With Empirical Data, 78 Iowa L. Rev. 1 (1992)) as "comprehensive and authoritative"[16] *itself* demonstrates that such reversals often occur.[17]

As for Oberg's argument (Br. 45-46) that the judgment of history establishes the jury's suitability to award damages, the short answer is that judicial review historically has been recognized as a necessary accompanying safeguard. And while we certainly agree that judicial excessiveness review under the common law standard is not a "panacea" (*id.* at 48), it goes at least some of the way towards minimizing jury errors. TLPJ's "authoritative" article, like the brief filed by ATLA in *TXO* (see

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[16] We assume that the "peer review" noted by TLPJ refers to the student law review editors who accepted the article for publication. We also note that the data in the article were developed with the financial assistance of the Roscoe Pound Foundation (see 78 Iowa L. Rev. at 1 n.*), which is operated under the auspices of Oberg's *amicus*, the American Trial Lawyers Association (ATLA). As for Honda's empirical study, TLPJ asserts (at Br. App. A) that Honda miscited 13 cases. Even assuming that TLPJ is correct in its characterization of the cases, only <u>one</u> of the decisions TLPJ points to was included on Honda's list of cases granting remittiturs; <u>12</u> were included on Honda's list of cases in which excessiveness challenges were rejected. TLPJ's correction therefore increases from approximately 28% to approximately 30% the percentage of cases in which excessiveness claims were granted.

[17] Oberg and his *amici* contend that the relevant empirical question is whether punitive awards in Oregon are, on average, smaller than in other states, and they assert that Oregon awards historically have been on the low side. See Oberg Br. 19. In fact, recent seven-figure punitive awards in Oregon (in addition to the judgment in this case and those cited at Honda Br. 21, see *Lakin* v. *Senco Prods., Inc.*, No. A9211-07901 (Or. Cir. Ct. Feb. 4, 1994) ($4 million punitive award in product liability action)) suggest that the trend towards astronomical judgments long visible in other states has now reached Oregon with a vengeance. In any event, the fact (if it is a fact) that relatively few other people are suffering unlawful deprivations of property is cold comfort to a defendant who is.

Honda Br. 30 n.22), therefore observed that "punitive damages are appropriately kept in check by judicial controls." Rustad, *supra*, at 58. All that has changed since ATLA and Rustad last wrote on the subject is the self-interest of the plaintiff they support.

c. Addressing Oregon's interest, Oberg asserts (Br. 48) that Honda disregards the importance to the State of having damages awarded by persons who (apparently unlike judges) have a "connection with ordinary life."[18] That, however, was not the justification for the amendment of Article VII, § 3, which was intended simply to avoid the expense of retrials. See Honda Br. 34. Oberg offers *no* response to our submission (see Honda Br. 33-35) that providing excessiveness review will impose no substantial burden on Oregon and that, in the circumstances of this case, the State's interest in economy cannot justify its failure to provide procedures reasonably likely to correct erroneous deprivations of property.

d. Finally, Oberg's hyperbolic argument (Br. 49-50) that Honda's position would constitutionalize Fed. R. Civ. P. 59(a) and Fed. R. Crim. P. 33, require judges in all cases to sit as "thirteenth jurors," and otherwise lead to the quick demise of the Republic is — yes, again — premised on a "breathtaking" (Oberg Br. 49) misstatement of Honda's position. We do not ask the Court to constitutionalize "weight-of-the-evidence" review; we contend, instead, that judges must determine whether an award is so large that it transgresses the state-law constraints on compensatory and punitive judgments. The Court *already* has indicated in *TXO* that such review is mandated by the Due Process Clause, and Oberg has done nothing to call that conclusion into question.

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[18] We note that this supposed state interest seems quite inconsistent with the various subterfuges for circumventing Article VII, § 3 that Oberg hypothesizes at Br. 33-38.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

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